

148 FERC ¶ 61,002
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

ITC Great Plains, LLC

Docket No. ER14-1861-000

ORDER ACCEPTING JOINT OWNERSHIP AGREEMENT

(Issued July 1, 2014)

1. On May 2, 2014, pursuant to section 205 of the Federal Power Act (FPA),¹ ITC Great Plains, LLC (ITC Great Plains) submitted a proposed Joint Ownership Agreement (Agreement) between ITC Great Plains and Mid-Kansas Electric Company, LLC (Mid-Kansas). In this order, we accept the Agreement for filing, to be effective July 1, 2014 as requested.

I. Filing

2. ITC Great Plains explains that it is an independent, stand-alone transmission company engaged exclusively in developing, owning, and operating electric transmission facilities.² ITC Great Plains states that Mid-Kansas is a non-profit generation and transmission cooperative formed by members of the Sunflower Electric Power Corporation (Sunflower) generation and transmission cooperative to purchase the electric assets of Aquila, Inc. in Kansas.³ ITC Great Plains and Mid-Kansas are transmission-owning members of Southwest Power Pool, Inc. (SPP), and each has a formula rate in Attachment H of SPP's open access transmission tariff (Tariff).⁴

3. ITC Great Plains explains that as part of SPP's 2012 Integrated Transmission Planning 10-Year Assessment, SPP's board of directors approved the Elm Creek to Summit Project, a 60 mile, 345 kV transmission line in central Kansas that will link the

¹ 16 U.S.C. § 824d (2012).

² Transmittal at 1.

³ *Id.* at n.3.

⁴ *Id.* at 2-3.

345 kV Westar Energy, Inc. (Westar) Summit substation to a new 345 kV substation near ITC Great Plains' existing 230 kV Elm Creek Substation.⁵ Westar will construct, own, and operate the southern section of the line and ITC Great Plains will construct, operate, and co-own with Mid-Kansas the northern section (Project).⁶

4. ITC Great Plains states that the Project, which is anticipated to be in-service by the end of 2016, is in the retail service territory of Mid-Kansas and its members.⁷ According to ITC Great Plains, the revenue requirements of the Project will be recovered by ITC Great Plains and Mid-Kansas under their individual formula rates in Attachment H to the SPP Tariff, based on ITC Great Plains' and Mid-Kansas' respective ownership percentages in the Project.⁸

5. ITC Great Plains explains that on May 1, 2014, it and Mid-Kansas entered into the Agreement under which ITC Great Plains will construct and operate the Project and co-own the Project with Mid-Kansas.⁹ According to ITC Great Plains, the Agreement establishes how the Project will be operated and maintained, and sets forth the rights and obligations of ITC Great Plains as the Operator of the Project.¹⁰

6. ITC Great Plains states that the Agreement is structured to comply with the Commission's *Policy Statement Regarding Evaluation of Independent Ownership and Operation of Transmission*,¹¹ and to preserve ITC Great Plains' independence.¹² ITC

⁵ *Id.* at n.6.

⁶ *Id.* at 2.

⁷ *Id.* ITC Great Plains notes that this area is described in the Agreement as the "Mid-Kansas Territory" and includes: (a) the areas that are the Kansas Corporation Commission (Kansas Commission) approved retail service territory of Mid-Kansas; (b) the areas previously included in (a) that are in the Kansas Commission approved retail service territory of each of the members of Mid-Kansas; and (c) the areas that are the Kansas Commission-approved retail service territory of another utility receiving transmission service from Mid-Kansas or from SPP over the Mid-Kansas system.

Id. at n.5.

⁸ *Id.* at 3.

⁹ *Id.*

¹⁰ *Id.*

¹¹ 111 FERC ¶ 61,473 (2005) (*Policy Statement*).

Great Plains contends that in the *Policy Statement*, the Commission expressed support for stimulating independent transmission companies' investment in transmission infrastructure.¹³ ITC Great Plains also states that the *Policy Statement* set out factors for determining the independence of a transmission company that has market participants as equity owners, and the Commission specified that passive minority participation of up to 49 percent ownership by a single market participant would not compromise the independence of a transmission company.¹⁴

7. ITC Great Plains explains that it will own at least 51 percent and Mid-Kansas will own at most 49 percent of the Project under the Agreement, and it asserts that this degree of ownership is consistent with the *Policy Statement*. ITC Great Plains asserts that the Agreement preserves ITC Great Plains' independence in that the Agreement is project-specific and will have no overarching implications for ITC Great Plains' operation, planning or investment decisions.¹⁵ ITC Great Plains states that while it will be responsible for construction and operation of the Project, the decision to build the Project was made by SPP, the Project's scope and location were determined by SPP, the Project will be under SPP's functional control, and transmission service using the Project will be provided under the SPP Tariff.¹⁶

8. ITC Great Plains argues that in the *Policy Statement*, the Commission recognized the value of joint ownership structures that "facilitate participation by municipalities, cooperatives, and other transmission dependent users of the grid."¹⁷ ITC Great Plains also asserts that the Agreement facilitates ITC Great Plains' partnership approach with Kansas customer-owned cooperative energy companies.¹⁸ ITC Great Plains notes that

¹² Transmittal at 3.

¹³ *Id.* (citing *Policy Statement*, 111 FERC ¶ 61,473).

¹⁴ *Id.* at 3-4 (citing *Policy Statement*, 111 FERC ¶ 61,473 at P 5).

¹⁵ *Id.* at 4. ITC Great Plains notes that while the *Policy Statement* addressed the independence of a transmission company in the context of market participants holding equity interests in a transmission company, the Agreement does not provide for Mid-Kansas to own any part of ITC Great Plains, but instead provides for Mid-Kansas to co-own the Project with ITC Great Plains. *Id.* at n.12.

¹⁶ *Id.* at 4, 6.

¹⁷ *Id.* (quoting *Policy Statement*, 111 FERC ¶ 61,473 at P 9).

¹⁸ *Id.*

the Commission recognized in 2009 that a maintenance agreement between ITC Great Plains and Mid-Kansas did not compromise ITC Great Plains' independence.¹⁹ ITC Great Plains maintains that the Agreement establishes a process for Mid-Kansas to participate in major decisions related to the Project in a manner that is consistent with the Commission's recognition in the *Policy Statement* that passive market participant owners need to participate in significant decisions.²⁰

II. Notice of Filing and Responsive Pleading

9. Notice of ITC Great Plains' filing was published in the *Federal Register*, 79 Fed. Reg. 26,742 (2014), with interventions and protests due on or before May 23, 2014. Sunflower and Mid-Kansas filed a joint motion to intervene and comments in support of the Agreement.

10. Sunflower and Mid-Kansas urge the Commission to accept the Agreement. According to Sunflower and Mid-Kansas, co-ownership (rather than outright ownership) of transmission facilities is preferred by cooperatives and other public power entities that are able to issue tax-exempt bonds. In turn, Sunflower and Mid-Kansas argue, co-ownership is attractive to entities such as Mid-Kansas, which can finance its investment under its mortgage bond indenture. Sunflower and Mid-Kansas assert that the decision to proceed with co-ownership allows Mid-Kansas to use its limited capital for other more pressing needs, while retaining an investment opportunity in regional infrastructure. According to Sunflower and Mid-Kansas, having an opportunity to invest in assets whose costs are borne by the region helps Mid-Kansas hedge against higher transmission costs as the high-voltage system is built out.²¹ Sunflower and Mid-Kansas claim that co-ownership of transmission projects between public power and independent transmission companies is increasingly needed, given the implementation of competitive processes for construction of regionally-planned facilities under Order No. 1000.²² According to Sunflower and Mid-Kansas, co-ownership of transmission projects may be the only way smaller public power systems can participate in transmission expansion investments.

¹⁹ *Id.* (citing *ITC Great Plains, LLC*, 126 FERC ¶ 61,223, at P 93 (2009)).

²⁰ *Id.* (citing *Policy Statement*, 111 FERC ¶ 61,473 at P 6).

²¹ Sunflower and Mid-Kansas Comments at 4.

²² *Id.* at 5 (citing *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 76 FR 49842 (Aug. 11, 2011), FERC Stats. & Regs. ¶ 31,323 (2011), Order No. 1000-A, 77 FR 32184 (May 31, 2012), 139 FERC ¶ 61,132 (2012)).

11. Sunflower and Mid-Kansas also request that the Commission clarify that co-ownership of discrete projects under a Regional Transmission Organization's (RTO) functional control, and built under an RTO's directive as a result of its planning process, in no way jeopardizes the independence of a transmission company. Sunflower and Mid-Kansas argue that such a finding would encourage additional joint ownership arrangements among transmission companies and public power entities, and it would eliminate some of the difficulties Mid-Kansas faced in seeking normal protections to protect its investment as a co-owner.²³ Sunflower and Mid-Kansas argue that certain provisions in the Agreement, including standards of care, remedies for violation of the standards, and approval rights held by Mid-Kansas over certain major actions, should have no impact on ITC Great Plains' independence.

12. Sunflower and Mid-Kansas argue that the *Policy Statement* is concerned with passive investment in an independent *company*, rather than passive investment in a *facility*.²⁴ Therefore, Sunflower and Mid-Kansas contend that the Commission should find that the *Policy Statement* is not relevant here, where the issue is co-ownership of transmission assets. In this regard, Sunflower and Mid-Kansas state that under the Agreement, Mid-Kansas will not own an equity position in ITC Great Plains or have any control over ITC Great Plains' internal governance. If the Commission declines to clarify that co-ownership of discrete projects under an RTO's functional control does not jeopardize a transmission company's independent status, Sunflower and Mid-Kansas request that the Commission find that a transmission company's independent status will not be compromised where the co-owners of transmission facilities are non-profit public power entities. Sunflower and Mid-Kansas contend that this finding is consistent with the Commission's specific support in the *Policy Statement* for co-ownership of transmission companies by public power entities.²⁵

13. Sunflower and Mid-Kansas also request that the Commission provide a general clarification as to which, if any, contractual provisions that are intended to provide co-owner protections, would compromise a transmission company's independent status.²⁶ According to Sunflower and Mid-Kansas, the Agreement contains "typical co-owner controls" over ITC Great Plains that allow Mid-Kansas to protect its investment, but that do not affect ITC Great Plains' independence. Specifically, Sunflower and Mid-Kansas assert that the section 6.1.1 of the Agreement, which requires that major decisions have

²³ *Id.* at 6-7.

²⁴ *Id.*

²⁵ *Id.* at 8 (citing *Policy Statement*, 111 FERC ¶ 61,473 at P 9).

²⁶ *Id.* at 8-9.

unanimous consent by a committee of two representatives from each co-owner, is comparable to the provisions at issue in *ITC Holdings Corp.*²⁷ Sunflower and Mid-Kansas state that in *ITC Holdings*, the Commission found that provisions allowing the passive co-owner to vote on matters that could significantly affect its financial interests merely protected the passive co-owner's investment in the transmission company and, because these provisions did not provide the co-owner with the ability to direct the day-to-day operations of the transmission company, they did not compromise its independence.²⁸ Sunflower and Mid-Kansas add that the Agreement's provision allowing Mid-Kansas to remove ITC Great Plains as Operator of the Project if ITC Great Plains violates its duty of care also does not compromise ITC Great Plains' independence.²⁹ Sunflower and Mid-Kansas request that, at a minimum, the Commission recognize that, for public power to participate with independent transmission companies, there must be remedies to protect against a failure to perform.

III. Discussion

14. We accept the Agreement, to be effective July 1, 2014, as requested. We discuss below whether certain provisions of the Agreement will affect ITC Great Plains' independence. As expressed in the *Policy Statement*, the Commission supports joint ownership structures that facilitate participation by municipalities, cooperatives, and other transmission-dependent users of the grid in the development of transmission projects.³⁰ While the *Policy Statement* addressed ownership of a transmission company, the Commission's support for joint ownership structures that facilitate participation by municipalities, cooperatives, and other transmission-dependent users of the grid also extends to ownership of transmission projects.³¹

15. In response to the request of Sunflower and Mid-Kansas for clarification as to which, if any, contractual provisions would compromise ITC Great Plains' independent status, we find that certain of the provisions giving Mid-Kansas rights over ITC Great Plains are intended to protect Mid-Kansas's investment, and they do not give Mid-Kansas control over the day-to-day operations of the Project. For example, section 6.1.1 of the

²⁷ *Id.* at 9 (citing *ITC Holdings Corp.*, 102 FERC ¶ 61,182, at P 42 (2003) (*ITC Holdings*), *order on reh'g*, 111 FERC ¶ 61,149 (2005)).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Policy Statement*, 111 FERC ¶ 61,473 at P 9.

³¹ *Supra* note 30.

Agreement requires that “major decisions” have the unanimous consent of a committee made up of two representatives from each company. Under section 6.1.1, “major decisions” are any Project expansion or modification of more than 25 percent of the Project’s original value, a change in operation and maintenance practices that increases the Project’s annual budget by more than 25 percent, and retirement or abandonment of the Project. Because section 6.1.1 of the Agreement is intended to protect Mid-Kansas’ investment and does not give Mid-Kansas control over day-to-day operations, we find that section 6.1.1 of the Agreement does not compromise ITC Great Plains’ independence.³²

16. However, regarding section 5.5.1 of the Agreement,³³ we find that if Mid-Kansas replaced ITC Great Plains as Operator under section 5.5.1 of the Agreement, then ITC Great Plains’ independence would be affected because Mid-Kansas, a market participant, could control the day-to-day operations of the Project.³⁴

³² See *ITC Holdings*, 102 FERC ¶ 61,182 at P 42 (finding limited partners’ consent rights over numerous matters, including any increase in the budget greater than 15 percent, did not compromise transmission company’s independence).

³³ Section 5.5.1 of the Agreement states, in relevant part:

In General If the Operator fails at any time to fulfill any material obligation under Section 5.4.2(b) hereof (“Operator Failure”) and the other Party has provided written notice thereof to the Operator and such failure continues [beyond various applicable cure periods] . . . the Operator’s sole liability shall be as follows:

- (a) The other Party, as its sole and exclusive remedy, legal or equitable, shall have the right to remove the Operator and become the Operator unless by doing so, the FERC Independence Assurance would no longer be effective.

Under section 1.1.24 of the Agreement “FERC Independence Assurance” is defined as “assurance from FERC that Mid-Kansas’ ownership of the Mid-Kansas Ownership Interest (together with Sunflower Ownership Interest) will not affect the independence of ITC or any ITC Affiliate determined by FERC to be independent.”

³⁴ See, e.g., Policy Statement, 111 FERC ¶ 61,473 at P 5 (“In evaluating any proposed passive ownership structure in an [independent transmission company] application, the Commission will focus on the ability of the applicant to operate free of market participant control or influence.”).

17. With respect to the requests of Sunflower and Mid-Kansas that the Commission clarify that co-ownership of discrete projects under an RTO's functional control does not jeopardize the independence of a transmission company, and clarify that a transmission company's independent status will not be compromised where the co-owners of transmission facilities are non-profit public power entities, we find that the requested clarifications are beyond the scope of the Agreement and this proceeding.

The Commission orders:

The Agreement is hereby accepted to become effective July 1, 2014, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.